NO. 80091-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

REYES RIOS RUIZ AND JESUS DAVID BUELNA VALDEZ,
Respondents

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.'s
05-1-01065-7 and 05-1-01064-9

PETITIONER'S RESPONSE TO THE AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. RESPONSE TO STATEMENT OF FACTS SET FORTH IN THE AMICUS CURIAE BRIEF

The State submits that the American Civil Liberties Union of Washington (ACLU) has made the same fundamental mistake that was made in Division II when it refers to the search of the motor vehicle. Division II consistently referred to a second search when referring to the use of the dog to sniff for narcotics. As clearly demonstrated in the Findings of Fact that were entered and have been attached to the Supreme Court Petition, the use of the dog was a continuous, contemporaneous and on going initial search of the vehicle. This is clearly spelled out in Findings of Fact number five of the Findings of Fact and Conclusions of Law on CrR3.5/3.6 Hearing (Ruiz CP 34; Valdez, CP 37).

Finding of fact number 5 reads as follows:

> 5. Detective Dennison and Deputy Boyle began to search the interior passenger compartment of the minivan. They noticed that panels under the dash board were loose, and appeared to have been tampered with. Detective Dennison was aware that drugs are sometimes hidden behind plastic panels in vehicles, and that panels are sometimes loose from having been removed. Based upon the loose panels and Valdez evasive statements about where he was coming from, Detective Dennison called for a narcotics detection dog to assist in the search. Deputy Brian Ellithorpe and his dog Eiko were dispatched at 8:12 p.m., and arrived at the location of the stop at 8:20 p.m. When Deputy Ellithorpe arrived he observed a subject in

> custody in a patrol car, and a second subject standing a short distance away from the minivan.
>
> -(Findings of Fact and Conclusions of Law, (Ruiz CP 34; Valdez CP 37) Finding of Fact number 5).

Also as part of the Statement of Facts set forth by the ACLU is a comment concerning the parties and courts below focus on whether or not use of the dog exceeded the scope of the Stroud exception to the warrant requirement. (ACLU Amicus Curiae Brief page 3) As demonstrated in the trial court record and in the initial briefing in the Appellate system, the use of the dog was a minor component to the overall claim. Nowhere at the trial court was the use of the dog raised in Article 1 Section 7 context. The initial appeal dealt with the scope of the search of the passenger compartment and not necessarily related to the use of the dog.

The Petition to the Supreme Court by the State of Washington did not focus on the use of the dog either. The complaint lodged by the State of Washington was that the Court of Appeals, Division II, had totally ignored uncontested findings of fact at the trial court level, manufactured their own facts, and, based on that, determined that there had been an improper search.

II. RESPONSE TO ARGUMENT A- STROUD IS INCONSISTENT WITH PRIVACY GUARANTEES OF ARTICLE 1, SECTION 7

The amicus curiae brief of the ACLU first questions whether or not the decision in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) continues to be viable law and whether or not it actually protects privacy rights of the citizens of the State of Washington under Article 1, Section 7.

Stroud has consistently been the law in the State of Washington now for over 20 years and continues to be viable. The handful of cases that make it through the appellate system are a far cry from the pre- Stroud flood of cases where everything was dealt with on a case by case basis. One of the acknowledged reasons for the Stroud decision was to give law enforcement bright line rules concerning search and seizure as it relates to the passenger compartment of vehicles. This not only assisted law enforcement but was also a way of protecting the rights of the citizens of the State of Washington. State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001) has a very interesting discussion of the purposes behind Stroud and maintained that it continues to be viable in the modern world. In Vrieling, the police stopped a motor home driven by the defendant after receiving a dispatch of a vehicle prowl. She provided false information to the officers and ultimately arrested for driving without a valid license. During the search incident to the arrest, a stolen, loaded pistol was found inside a

zipped cushion in the back of the motor home. The defendant attempted to suppress the pistol but the appellate court, including the Supreme Court, ruled that the motor home was not entitled to the same privacy protection as a fixed residence and that the search incident to a lawful arrest was permissible to the areas accessible by the occupants of the vehicle. In addition, the court held that the zipped cushion was not the equivalent of a locked container. Therefore, the search warrant was not required and the denial of the motion to suppress was affirmed.

The Supreme Court in Vrieling went into an extended discussion of the Stroud case. Their discussion started as follows:

> In *Stroud,* this court held that "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." *Stroud*, 106 Wn.2d at 152. However, the officers may not unlock and search a locked container or locked glove compartment without obtaining a warrant. *State v. Fladebo*, 113 Wn.2d 388, 395, 779 P.2d 707 (1989); *see Stroud*, 106 Wn.2d at 152.
>
> In establishing a bright-line rule, the court in *Stroud* expressly overruled *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), where the court had held that during a search incident to the arrest of the driver of a vehicle, the officer may search the person arrested and the area within his immediate control to remove any weapons the person might try to use to escape or resist arrest, and to avoid destruction of evidence of the crime for which the person is arrested. *Ringer*, 100 Wn.2d at 699-700. The court in *Ringer* had concluded, under this holding, that in the two cases before it searches of the

> vehicles could not be justified as searches incident to arrest because the drivers had been handcuffed and placed in the back of patrol cars prior to the searches. *Id.* at 700.
>
> The rule in *Stroud* was specifically adopted to eliminate the need for a case by case assessment of when a warrantless search of an automobile incident to the arrest of the driver would be permissible, an approach deemed to be too burdensome for police officers in the field. *Stroud* and *Fladebo* acknowledge the greater privacy interest that this state's citizens have in their vehicles under article I, section 7 of the state constitution than under the Fourth Amendment, because locked containers within the vehicle are not subject to search.
>
> -(Vrieling, 144 Wn.2d at 492 – 494)

It is also of interest that during that discussion there is an extensive footnote further clarifying Stroud and how it came about. This section also helps put Stroud in context:

> N1 In *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), a majority (eight members of the court signing the lead and concurring opinions) held, as stated, that a search of the passenger compartment incident to arrest of the driver is permissible without a warrant under article I, section 7. The lead and concurring opinions disagreed, however, as to whether privacy interests should be considered. The lead opinion reasoned that the dangers to the officer and possible destruction of evidence must be weighed against whatever privacy interests the person arrested has in the articles in the vehicle. *Stroud*, 106 Wn.2d at 151-52 (Goodloe, J.). The lead opinion concluded that this weighing would not be done on a case by case basis, however, because it would be too difficult a rule for effective law enforcement and protection of individual rights. Accordingly, the lead opinion adopted a bright-line rule allowing a search of the passenger

> compartment incident to arrest. The lead opinion added, however, that locked containers or glove compartments could not be opened and searched because the fact such articles are locked demonstrates that an individual reasonably expects the contents to remain private, and because the danger that an individual could hide or destroy evidence within the container or grab a weapon from it is minimized. 106 Wn.2d at 152.
>
> The concurring opinion disagreed with the reasoning of the lead opinion, concluding that a lawful arrest provides the authority of law to search incident to arrest without a warrant, and privacy interests are thus irrelevant. Accordingly, the concurrence reasoned, locked containers could be searched along with the rest of the passenger compartment and unlocked containers or glove compartments. 106 Wn.2d at 164, 168-70 (Durham, J., concurring).
>
> While the rationales of the two opinions differ, an eight-member majority clearly held that a search of the passenger compartment incident to arrest may be effected without a warrant during the arrest process and the time immediately subsequent to the arrest. There is, however, no majority opinion in *Stroud* on the issue of whether locked containers may be searched. The four justices signing the lead opinion believed that they could not, while the four justices signing the concurrence believed they could be. The remaining member of the court signed the lead opinion in result only, thus leaving the issue unresolved, since there was, in fact, no search of any locked container in the case.
>
> The issue was resolved subsequently in *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989), when a majority of the court adopted the locked container rule proposed by the lead opinion in *Stroud.*
>
> -(Vrieling, 144 Wn.2d at 492, footnote number 1)

The State submits that this discussion is significant because it continues to show the ongoing viability of Stroud and the fact that the concerns raised by the ACLU were taken into consideration by the

Supreme Court at the time it decided Stroud and the subsequent cases that have interpreted it.

III. RESPONSE TO ARGUMENT B- THE DOG SEARCH OF THE VAN VIOLATED STROUD

The State submits that the ACLU has again made the same mistake that Division II made in commenting that the "initial search" had been completed and that the dog was there for a subsequent search. This is not consistent with any findings of fact entered by the trial court nor was it the subject of any exceptions to the findings. This was a continuous on-going search. This was also clearly set forth in the dissenting opinion in the Court of Appeals, Division II. The Judge in writing the dissent makes comment that this mistake was being made by the majority and her conclusion was that the officers were conducting a continuous search incident to Mr. Valdez arrest on an outstanding warrant. The call for the canine unit did not end their continuing, lawful search incident to his arrest especially when the officer's had not yet completed their search of the van. State v. Valdez, 137 Wn. App. 280, 152 P.3 1048, dissent (Judge Hunt) page 292 – 294. This was a continuation of the initial search can also be demonstrated by the subsequent conduct with the vehicle. Once the sniff dog had assisted the officers in finding the narcotics, and field

testing, Deputy Dennison seized the vehicle, had it sealed and towed to a storage yard. He then obtained a search warrant to conduct a further search of the vehicle which was executed on May 12, 2005. In that search, an insurance card and Idaho vehicle registration in the name of someone else was found in the front of the vehicle, and two live rounds of ammunition and one spent casing were also found. No additional drugs or drug paraphernalia were found in the vehicle. This demonstrates that the officer's were not on some type of fishing expedition as claimed by the ACLU, but had found some contraband and sealed the vehicle for a subsequent search warrant. This is conduct that is in line with their standard procedures and is also consistent with the dictates of Stroud and it's subsequent case law.

On page 11 of the ACLU's amicus curiae the writer makes a comment, "Dogs are incapable of respecting privacy rights, even to the minimal extent required by Stroud." It is hard for the State to understand exactly what the writer for the ACLU is referring to here. The only thing that a trained narcotics dog, such as the one used in this case, responds to is narcotics. The State submits that an individual has no privacy rights to illegal contraband. As indicated in U.S. v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), a canine sniff of travelers' luggage was not a search within the meaning of the Fourth Amendment. The court noted

that the dog sniff is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. Place, 462 U.S. at 707.

Finally, the writer of the ACLU amicus curiae brief on page 12 likens the area where the drugs were found to a locked container or a locked glove compartment.

This notion was dealt with at the trial court level and in the detailed findings of fact and conclusions of law the trial Judge made the following observation:

> Conclusion of Law Number 7
>
> 7. Because the cup holder was unsecured and could be lifted easily and without force to expose the space underneath without breaking or removing any screw, lock, or fastener, the space under the cup holder was the equivalent of an unlocked glove box, console or other unlocked space within the passenger compartment and was thus also within the scope of the search of the vehicle incident to the driver's arrest. (cites omitted).
> -(Findings of Fact and Conclusions of Law, 3.5/ 3.6 Hearing (Ruiz CP 34; Valdez CP 37) Conclusions of Law 7) (in part)).

IV. CONCLUSION

The State of Washington continues to maintain that the Court of Appeals should be overturned and the convictions be reinstated.

DATED this 29 day of May, 2008.

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